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LexisNexis (TM) New Jersey Annotated Statutes

*** THIS SECTION IS CURRENT THROUGH NEW JERSEY 214TH LEGISLATURE ***
2ND ANNUAL SESSION (P.L. 2011 CHAPTER 46 AND JR 3)
STATE CONSTITUTION CURRENT THROUGH THE NOVEMBER, 2010 ELECTION
ANNOTATIONS CURRENT THROUGH APRIL 12, 2011.

TITLE 2C. THE NEW JERSEY CODE OF CRIMINAL JUSTICE
SUBTITLE 3. SENTENCING
CHAPTER 44. AUTHORITY OF COURT

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N.J. Stat. § 2C:44-3 (2011)

§ 2C:44-3. Criteria for sentence of extended term of imprisonment

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. If the grounds specified in subsection d. are found, and the person is being sentenced for commission of any of the offenses enumerated in N.J.S.2C:43-6 c. or N.J.S.2C:43-6 g., the court shall sentence the defendant to an extended term as required by N.J.S.2C:43-6 c. or N.J.S.2C:43-6 g., and application by the prosecutor shall not be required. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime under N.J.S.2C:14-2 or N.J.S.2C:14-3 to an extended term of imprisonment if the grounds specified in subsection g. of this section are found. The court shall, upon application of the prosecuting attorney, sentence a person to an extended term if the imposition of such term is required pursuant to the provisions of section 2 of P.L.1994, c.130 (C.2C:43-6.4). The finding of the court shall be incorporated in the record.

a. The defendant has been convicted of a crime of the first, second or third degree and is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes, committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

b. The defendant has been convicted of a crime of the first, second or third degree and is a professional criminal. A professional criminal is a person who committed a crime as part of a continuing criminal activity in concert with two or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood.

c. The defendant has been convicted of a crime of the first, second or third degree and committed the crime as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value the amount of which was unrelated to the proceeds of the crime or he procured the commission of the offense by payment or promise of payment

of anything of pecuniary value.

d. Second offender with a firearm. The defendant is at least 18 years of age and has been previously convicted of any of the following crimes: 2C:11-3, 2C:11-4, 2C:12-1 b., 2C:13-1, 2C:14-2 a., 2C:14-3 a., 2C:15-1, 2C:18-2, 2C:29-5, 2C:39-4 a., or has been previously convicted of an offense under Title 2A of the New Jersey Statutes or under any statute of the United States or any other state which is substantially equivalent to the offenses enumerated in this subsection and he used or possessed a firearm, as defined in 2C:39-1 f., in the course of committing or attempting to commit any of these crimes, including the immediate flight therefrom.

e. (Deleted by amendment, P.L.2001, c.443).

f. The defendant has been convicted of a crime under any of the following sections: N.J.S.2C:11-4, N.J.S.2C:12-1 b., N.J.S.2C:13-1, N.J.S.2C:14-2 a., N.J.S.2C:14-3 a., N.J.S.2C:15-1, N.J.S.2C:18-2, N.J.S.2C:29-2 b., N.J.S.2C:29-5, N.J.S.2C:35-5, and in the course of committing or attempting to commit the crime, including the immediate flight therefrom, the defendant used or was in possession of a stolen motor vehicle.

g. The defendant has been convicted of a crime under N.J.S.2C:14-2 or N.J.S.2C:14-3 involving violence or the threat of violence and the victim of the crime was 16 years of age or less.

For purposes of this subsection, a crime involves violence or the threat of violence if the victim sustains serious bodily injury as defined in subsection b. of N.J.S.2C:11-1, or the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon as defined in subsection c. of N.J.S.2C:11-1, or threatens to inflict serious bodily injury.

h. (Deleted by amendment, P.L.2007, c.341).

HISTORY: L. 1978, c. 95; amended 1979, c. 178, § 95; 1981, c. 31, § 3; 1990, c. 32, § 8; 1990, c. 87, § 4; 1993, c. 132, § 2; 1994, c. 127, § 2; 1994, c. 130, § 4; 1995, c. 211, § 3; 1997, c. 120; 1999, c. 160, § 4, eff. July 8, 1999; 2001, c. 443, § 8, eff. Jan. 11, 2002; 2007, c. 341, § 8, eff. Jan. 13, 2008.

NOTES:

Amendment Note:

2007 amendment, by Chapter 341, in the first paragraph, deleted the former fourth sentence, which read: "The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime to an extended term of imprisonment if the grounds specified in subsection h. of this section are found"; and deleted h. [see now 2C:33-29, 2C:33-30].

Former h. read: "The crime was committed while the defendant was knowingly involved in criminal street gang related activity. A crime is committed while the defendant was involved in criminal street gang related activity if the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. 'Criminal street gang' means three or more persons associated in fact. Individuals are associated in fact if (1) they have in common a group name or identifying sign, symbol, tattoo or other physical marking, style of dress or use of hand signs or other indicia of association or common leadership, and (2) individually or in combination with other members of a criminal street gang, while engaging in gang related activity, have committed, conspired or attempted to commit, within the preceding three years, two or more offenses of robbery, carjacking, aggravated assault, assault, aggravated sexual assault, sexual assault, arson, burglary, kidnapping, extortion, or a violation of chapter 11, section 3, 4, 5, 6 or 7 of chapter 35 or chapter 39 of Title 2C of the New Jersey Statutes regardless of whether the prior offenses have resulted in convictions.

The court shall not impose a sentence pursuant to this subsection unless the ground therefore has been established

by a preponderance of the evidence established at a hearing, which may occur at the time of sentencing. In making its finding, the court shall take judicial notice of any testimony or information adduced at the trial, plea hearing or other court proceedings and also shall consider the presentence report and any other relevant information."

OLS Corrections:

Pursuant to R.S.1:3-1, the Office of Legislative Services, through its Legislative Counsel and with the concurrence of the Attorney General, corrected a technical error in L. 2007, c. 341, § 8.

Editor's Note:

Instruction in gang violence prevention required for elementary school students, 18A:35-4.26.

Cross References:

Tampering, damage involving nuclear electric generating plant; crime of first degree, see 2C:17-7.

Nuclear electric generating plant; damaging or tampering with equipment which results in death; crime of first degree, see 2C:17-8.

Nuclear electric generating plant; damaging or tampering with equipment which results in injury; crime of second degree, see 2C:17-9.

Solicitation, recruitment to join criminal street gang; crime, degrees, sentencing, see 2C:33-28.

Criteria for imposition of anti-drug profiteering penalty, see 2C:35A-3.

Sentence of imprisonment for crime; ordinary terms; mandatory terms, see 2C:43-6.

Sentence of imprisonment for crime; extended terms, see 2C:43-7.

Designation of crime related to street gang activity; offense for which fingerprinting required, see 53:1-15.1.

Administrative Code:

1. N.J.A.C. 10A:9-2.8 (2009), CHAPTER CLASSIFICATION PROCESS, Severity of Offense Scale.

LexisNexis (R) Notes:

CASE NOTES

1. Petitioner's request for habeas relief based on Apprendi error related to his sentence enhancement was denied because the first basis for the petitioner's extended term (that the petitioner was convicted of first degree robbery), had been submitted to a jury and proven beyond a reasonable doubt and the second basis (that the petitioner was a persistent offender), did not fall within the scope of Apprendi because the petitioner's enhanced sentence as a persistent offender based upon a record of prior convictions, N.J. Stat. Ann. § 2C:44-3(a), was a fact which could be determined by the judge and could serve as the basis for determining his statutory maximum sentence. *Abdullah v. Moore*, 2005 U.S. Dist. LEXIS 18411 (D.N.J. Aug. 23 2005).

2. Multiple narcotics offender was entitled to the same protection on sentencing under the Narcotics Drug Law, former N.J. Stat. Ann. § 24:18-47(b)(3), as that found in former N.J. Stat. Ann. § 2A:85-13 (now N.J. Stat. Ann. § 2C:44-3), the general Habitual Offenders Act, which contemplated a jury determination of prior convictions upon the formal service of an accusation by the state accusing defendant of prior convictions. *State v. Tyler*, 88 N.J. Super. 396, 212 A.2d 573, 1965 N.J. Super. LEXIS 367 (App.Div. 1965), writ of certiorari denied by 384 U.S. 992, 86 S. Ct. 1898, 16 L. Ed. 2d 1008, 1966 U.S. LEXIS 1390 (1966).

3. Presumptive sentence of four years imposed for a conviction for aggravated assault in the fourth degree, pursuant to N.J. Stat. Ann. § 2C:12-1(b), was illegal under N.J. Stat. Ann. §§ 2C:43-6(a)(4), 2C:43-7(a)(5), and 2C:44-3(d), which provided for a maximum 18-month sentence for a fourth degree crime, with a maximum extended term of five years. *State v. Naji*, 205 N.J. Super. 208, 500 A.2d 723, 1985 N.J. Super. LEXIS 1516 (App.Div. 1985).

4. Following convictions under N.J. Stat. Ann. §§ 2C:18-2, 2C:20-3, 2C:20-7, and 2C:15-1, a 30-year sentence was not excessive under N.J. Stat. Ann. § 2C:44-3 where defendants, who had long criminal histories, held a knife to the throat of a gas station attendant during the robbery. *State v. Munoz*, 340 N.J. Super. 204, 774 A.2d 515, 2001 N.J. Super. LEXIS 183 (App.Div. 2001).

5. Pursuant to the provisions of N.J. Stat. Ann. §§ 2C:11-3(b) and 2C:43-7, a person convicted of murder may be sentenced to the maximum term of life imprisonment provided under N.J. Stat. Ann. § 2C:43-7(a)(1) without the necessity for separate enhancement findings under N.J. Stat. Ann. § 2C:44-3. *State v. Maguire*, 84 N.J. 508, 423 A.2d 294, 1980 N.J. LEXIS 1402 (1980).

6. Indictment must allege the factual predicates; because defendant's indictment did not allege the facts essential to imposition of an extended term, the defendant was not subject to be sentenced to an extended term for sexual assault or criminal sexual contact, pursuant to N.J. Stat. Ann. § 2C:44-3(g). *State v. Velasquez*, 391 N.J. Super. 291, 918 A.2d 45, 2007 N.J. Super. LEXIS 80 (App.Div. 2007).

7. Inmate's third petition for habeas corpus in which the inmate raised claims identical to those asserted in previous unsuccessful petitions was not barred by res judicata; the doctrine of res judicata was inapplicable in a habeas corpus proceeding. *Worbetz v. Goodman*, 47 N.J. Super. 391, 136 A.2d 1, 1957 N.J. Super. LEXIS 646 (App.Div. 1957).

8. If a defendant withdraws from a plea agreement, the State is released from the terms of the bargain and may reinstate an application to treat defendant as a persistent offender under N.J. Stat. Ann. § 2C:44-3(a). *State v. Naji*, 205 N.J. Super. 208, 500 A.2d 723, 1985 N.J. Super. LEXIS 1516 (App.Div. 1985).

9. Defendant was sentenced as a persistent offender pursuant to N.J. Stat. Ann. § 2C:44-3(a) to an extended term of 10 years, half of which was to be served without parole eligibility; at the time of the plea, the prosecutor had expressly reserved the right to move for an extended term pursuant to N.J. Ct. R. 3:21-4(d); nevertheless, both the prosecutor and the trial judge had stated that defendant was subject to a maximum sentence of 5 years and that he could be denied parole eligibility for one-half of that term; thus, the sentence ultimately imposed illegally exceeded defendant's reasonable expectations per the plea agreement. *State v. Cartier*, 210 N.J. Super. 379, 510 A.2d 47, 1986 N.J. Super. LEXIS 1278 (App.Div. 1986).

10. Following convictions under N.J. Stat. Ann. §§ 2C:18-2, 2C:20-3, 2C:20-7, and 2C:15-1, a 30-year sentence was not excessive under N.J. Stat. Ann. § 2C:44-3 where defendants, who had long criminal histories, held a knife to

the throat of a gas station attendant during the robbery. *State v. Munoz*, 340 N.J. Super. 204, 774 A.2d 515, 2001 N.J. Super. LEXIS 183 (App.Div. 2001).

11. When defendant is a persistent offender under N.J. Stat. Ann. § 2C:44-3(a), a sentencing judge may consider convictions entered after defendant committed the instant crime, even when there is an appeal pending or right of direct appeal; therefore, the sentencing judge properly considered defendant's other convictions in ruling on the State's application for an extended term. *State v. Cook*, 330 N.J. Super. 395, 750 A.2d 91, 2000 N.J. Super. LEXIS 187 (App.Div. 2000).

12. Mandatory imposition of an extended term sentence under N.J. Stat. Ann. § 2C:44-3(d) and N.J. Stat. Ann. § 2C:43-6(c), cannot be based upon a foreign conviction; however, the seriousness of defendant's record and the aggravated nature of his offense was a more than sufficient basis for the court to impose the presumptive extended base term of 50-years imprisonment, with 20-years of parole ineligibility. *State v. Guzman*, 313 N.J. Super. 363, 712 A.2d 1233, 1998 N.J. Super. LEXIS 310 (App.Div. 1998).

13. A defendant was entitled to have granted his writ of habeas corpus to review the legality of his confinement for life in state prison after having pleaded guilty to three separate allegations each charging, in one count, armed robbery and, in the second count, that defendant was previously convicted of three high misdemeanors, resulting in a term of life imprisonment in each case; where former N.J. Stat. Ann. § 2A:85-12 (now N.J. Stat. Ann. § 2C:44-3) subjected an offender to a life sentence only if he had on three separate occasions been convicted of high misdemeanors, defendant's life sentences were erroneously applied where two of his convictions were disposed of on one occasion and could be considered as only one conviction. *State v. Culver*, 30 N.J. Super. 561, 105 A.2d 429, 1954 N.J. Super. LEXIS 684 (App.Div. 1954), affirmed by 16 N.J. 483, 109 A.2d 422, 1954 N.J. LEXIS 240 (1954).

14. With regard to defendant's sentencing on a robbery and eluding count, among other crimes, the trial court erred by failing to place on the record its reasons for applying an extended term to a different charge than that sought by the prosecutor. Therefore, the case required a remand to the trial court for an explanation of why it declined to accept the prosecutor's application to apply an extended term sentence to the eluding count and instead applied the extended term to the robbery count. *State v. Thomas*, 195 N.J. 431, 950 A.2d 209, 2008 N.J. LEXIS 792 (2008).

15. Defendant's extended term sentence, imposed under N.J. Stat. Ann. § 2C:44-3(a), was not unconstitutional. *State v. Dixon*, 346 N.J. Super. 126, 787 A.2d 211, 2001 N.J. Super. LEXIS 459 (App.Div. 2001).

16. Extended term sentence of life imprisonment with a 25-year mandatory minimum parole bar imposed under N.J. Stat. Ann. § 2C:43-7(b) for first-degree kidnapping offense was not excessive where defendant was a repeat offender under N.J. Stat. Ann. § 2C:44-3(a) and presented no mitigating factors. *State v. Pennington*, 154 N.J. 344, 712 A.2d 1133, 1998 N.J. LEXIS 609 (1998).

17. Trial court did not commit an abuse of discretion in imposing an extended term on defendant's third-degree conviction of aggravated assault while eluding a police officer after finding that defendant met the criteria of a persistent offender under N.J. Stat. Ann. § 2C:44-3(a); although defendant's prior convictions did not involve crimes of violence, they were similar to several of the property-related offenses in the current prosecution, and defendant's law-abiding life was for a relatively short period. *State v. Bauman*, 298 N.J. Super. 176, 689 A.2d 173, 1997 N.J. Super. LEXIS 88 (App.Div. 1997).

18. Defendant, who was an accomplice to an armed robbery, was subject to mandatory sentencing under N.J. Stat. Ann. §§ 2C:43-6(c) or 2C:44-3(d), as he was legally accountable for use of a firearm in a robbery, and no proof that the handgun used was operable was required to show it was a firearm. *State v. Gantt*, 195 N.J. Super. 114, 478 A.2d 422, 1984 N.J. Super. LEXIS 1051 (App.Div. 1984), affirmed by 101 N.J. 573, 503 A.2d 849, 1986 N.J. LEXIS 867 (1986).

19. Indictment must allege the factual predicates; because defendant's indictment did not allege the facts essential to imposition of an extended term, the defendant was not subject to be sentenced to an extended term for sexual assault or criminal sexual contact, pursuant to N.J. Stat. Ann. § 2C:44-3(g). *State v. Velasquez*, 391 N.J. Super. 291, 918 A.2d 45, 2007 N.J. Super. LEXIS 80 (App.Div. 2007).

20. Petitioner's request for habeas relief based on Apprendi error related to his sentence enhancement was denied because the first basis for the petitioner's extended term (that the petitioner was convicted of first degree robbery), had been submitted to a jury and proven beyond a reasonable doubt and the second basis (that the petitioner was a persistent offender), did not fall within the scope of Apprendi because the petitioner's enhanced sentence as a persistent offender based upon a record of prior convictions, N.J. Stat. Ann. § 2C:44-3(a), was a fact which could be determined by the judge and could serve as the basis for determining his statutory maximum sentence. *Abdullah v. Moore*, 2005 U.S. Dist. LEXIS 18411 (D.N.J. Aug. 23 2005).

21. N.J. Stat. Ann. § 2C:44-3a allowed imposition of enhanced sentence where defendant's "latest in time" prior crime or his "last release from confinement" occurred within 10 years of the date of the crime for which he was being sentenced, and both of those dates occurred more than 10 years before the date of defendant's current crimes; the State's claim that the trial court could use the date of the latest prior conviction arising from the "latest in time" prior crime had to be rejected since the plain language of the persistent offender statute did not allow the latest prior conviction to be used. *State v. Henderson*, 375 N.J. Super. 265, 867 A.2d 516, 2004 N.J. Super. LEXIS 466 (Law Div. 2004), remanded by 397 N.J. Super. 398, 937 A.2d 988, 2008 N.J. Super. LEXIS 4 (App.Div. 2008).

22. When defendant is a persistent offender under N.J. Stat. Ann. § 2C:44-3(a), a sentencing judge may consider convictions entered after defendant committed the instant crime, even when there is an appeal pending or right of direct appeal; therefore, the sentencing judge properly considered defendant's other convictions in ruling on the State's application for an extended term. *State v. Cook*, 330 N.J. Super. 395, 750 A.2d 91, 2000 N.J. Super. LEXIS 187 (App.Div. 2000).

23. As to a defendant's convictions for offenses involving sexual assault and kidnapping, his convictions were upheld on appeal and he was properly found to be a persistent offender based on multiple prior convictions but the trial judge erred in sentencing him by improperly imposing two concurrent extended terms of 30 years, in violation of N.J. Stat. Ann. § 2C:44-5(a)(2). The statutory limit of only one extended term was violated even though the terms were imposed concurrently. *N.J. v. Darnell Stewart*, 2009 N.J. Super. Unpub. LEXIS 2381 (Apr. 29, 2009).

24. Sentencing court's determination that defendant could be sentenced as a persistent offender, under N.J. Stat. Ann. § 2C:44-3(a), did not violate the Sixth Amendment because the determination was based on defendant's prior convictions, so it was allowable under the prior-conviction exception to the Apprendi rule. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

25. When it was requested that defendant be sentenced as a persistent offender to an extended term, the sentencing court first had to determine if defendant met the qualifications for such a sentence, under N.J. Stat. Ann. § 2C:44-3(a), and once the sentencing court so found, the sentencing range to which defendant was exposed, for Apprendi purposes, went from the minimum ordinary sentence to the maximum enhanced sentence, and a jury did not have to find the facts used to determine what sentence, within that range, should be imposed, so the sentencing court's consideration of whether defendant posed a danger to the public, in determining his sentence, did not violate the Sixth Amendment. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

26. Under N.J. Stat. Ann. § 2C:44-3(a), a sentencing court did not impermissibly find facts by assessing a prior conviction record and finding defendant statutorily eligible for an extended term as a persistent offender, but it was necessary to modify prior directions to sentencing courts as to the discretionary extended-term sentencing process. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

27. Sentencing procedures established in prior cases had to be restated to set in proper perspective the timing and purpose of the judicial fact-finding related to the "need for protection of the public," so that finding was not made until after a defendant had been determined to be subject, for Apprendi purposes, to a sentence up to the maximum of the discretionary extended-term range based on statutory eligibility as a persistent offender; the determination of the length of sentence imposed on a defendant, and whether that sentence should be within the permissibly enhanced range were, had to be regarded as separate and distinct from the court's determination of the top of the entire range of sentences to which a defendant was potentially subject as a persistent offender, as the sentencing court had to first, on application for discretionary enhanced-term sentencing under N.J. Stat. Ann. § 2C:44-3(a), review and determine whether a defendant's criminal record of convictions rendered him or her statutorily eligible, and, if so, then the top of the range of sentences applicable to the defendant, for purposes of Apprendi, became the top of the enhanced range. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

28. After a sentencing court determined, under N.J. Stat. Ann. § 2C:44-3(a), that a defendant was subject to enhanced-term sentencing, whether the court chose to use the full range of sentences was a function of the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public, and consideration of the protection of the public occurred during this phase of the sentencing process. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

29. Sentencing court's determination of whether a defendant met the minimum statutory requirements, under N.J. Stat. Ann. § 2C:44-3(a), for an extended-term sentence, based on objective facts gleaned from the record of a defendant's criminal convictions, could be made by the court, rather than a jury. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

30. Where the defendant had a prior conviction which provided for a maximum sentence of ten years or more, under N.J. Stat. Ann. § 2C:43-6(a)(2), that prior conviction was a valid predicate offense for purposes of his sentence under the Armed Career Criminal Act, 18 U.S.C.S. § 924(e). *United States v. Buie*, 547 F.3d 401, 2008 U.S. App. LEXIS 23304 (2d Cir. N.Y. 2008), writ of certiorari denied by 129 S. Ct. 1640, 173 L. Ed. 2d 1017, 2009 U.S. LEXIS 2309, 77 U.S.L.W. 3529 (U.S. 2009).

31. Under N.J. Stat. Ann. § 2C:44-3(a) there was ample basis to sentence defendant to an extended term, as he had two prior indictable convictions and four pending indictments. *State v. Dwight*, 378 N.J. Super. 289, 875 A.2d 986, 2005 N.J. Super. LEXIS 187 (App.Div. 2005).

32. In imposing a discretionary extended term under N.J. Stat. Ann. § 2C:44-3(a), a sentencing court must 1) consider whether the minimum statutory predicates for extended term eligibility are met; 2) determine whether to impose an extended term; 3) weigh the aggravating and mitigating factors to determine the base term of the extended term; and 4) decide whether to impose a period of parole ineligibility. *State v. Candelaria*, 311 N.J. Super. 437, 710 A.2d 545, 1998 N.J. Super. LEXIS 211 (App.Div. 1998).

33. Statutory predicates to an extended term under N.J. Stat. Ann. § 2C:44-3(a) were satisfied where: (1) the defendant was convicted within 10 years of the crimes for burglary, criminal attempt to commit sexual assault, and aggravated assault and, on a separate occasion, of three counts of burglary, and of theft by receiving stolen property and criminal attempt to commit burglary; (2) the defendant was over 18 at the time of the prior offenses and over 21 when the present crimes were committed; (3) the trial judge concluded that an extended term was necessary for the protection of the public. *State v. Candelaria*, 311 N.J. Super. 437, 710 A.2d 545, 1998 N.J. Super. LEXIS 211 (App.Div. 1998).

34. Defendant's conviction and sentence as a habitual criminal was vacated where the trial court introduced evidence of the date of his birth in order to attack an earlier forgery conviction, where defendant was under the age of 16 at the time of the commission of the offense, and the trial court therefore lacked jurisdiction to try him. *State v. McCall*, 14 N.J. 538, 103 A.2d 376, 1954 N.J. LEXIS 341 (1954).

35. When defendant is a persistent offender under N.J. Stat. Ann. § 2C:44-3(a), a sentencing judge may consider convictions entered after defendant committed the instant crime, even when there is an appeal pending or right of direct appeal; therefore, the sentencing judge properly considered defendant's other convictions in ruling on the State's application for an extended term. *State v. Cook*, 330 N.J. Super. 395, 750 A.2d 91, 2000 N.J. Super. LEXIS 187 (App.Div. 2000).

36. Extended term sentence of life imprisonment with a 25-year mandatory minimum parole bar imposed under N.J. Stat. Ann. § 2C:43-7(b) for first-degree kidnapping offense was not excessive where defendant was a repeat offender under N.J. Stat. Ann. § 2C:44-3(a) and presented no mitigating factors. *State v. Pennington*, 154 N.J. 344, 712 A.2d 1133, 1998 N.J. LEXIS 609 (1998).

37. Trial court was authorized under N.J. Stat. Ann. § 2C:44-3 to impose an extended sentence upon defendant, following his conviction of armed robbery, possession of a weapon for an unlawful purpose, possession of a prohibited weapon and possession of a weapon without the requisite permit, based upon defendant's prior Canadian conviction of armed robbery. *State v. Williams*, 284 N.J. Super. 142, 663 A.2d 1378, 1995 N.J. Super. LEXIS 277 (Law Div. 1995), affirmed by 309 N.J. Super. 117, 706 A.2d 795, 1998 N.J. Super. LEXIS 94 (App.Div. 1998).

38. Where the state sought a declaration at sentencing that defendant was a persistent offender under the terms of N.J. Stat. Ann. § 2C:44-3(a) and, accordingly, that it would seek sentencing to a mandatory extended term under the Graves Act, N.J. Stat. Ann. §§ 2C:43-6(c) and 2C:43-7, defendant was entitled not only to notice of that susceptibility but also to a hearing to establish the existence of the prior Graves Act conviction. *State v. Jefimowicz*, 230 N.J. Super. 42, 552 A.2d 638, 1989 N.J. Super. LEXIS 22 (App.Div. 1989), affirmed in part and reversed in part by 119 N.J. 152, 574 A.2d 428, 1990 N.J. LEXIS 60 (1990).

39. Imposition of an extended sentence for a burglary conviction was proper where defendant was convicted of four crimes as an adult prior to the commission of the burglary, and three separate offenses after the commission of the burglary but before the imposition of sentence; defendant was a persistent offender within the meaning of N.J. Stat. Ann. § 2C:44-3. *State v. Mangrella*, 214 N.J. Super. 437, 519 A.2d 926, 1986 N.J. Super. LEXIS 1542 (App.Div. 1986).

40. Persistent offender criteria embodied in N.J. Stat. Ann. § 2C:44-3(a) requires neither offenses to have occurred nor judgments to have been entered prior to the offense then before the court for sentencing, and provided that the other criteria embodied in § 2C:44-3(a) are satisfied, the trial court can consider any judgment entered prior to sentencing provided that there is no pending appeal or right of direct appeal; however, reasons should be expressed as to why the court, in granting the application, considered matters involving the offenses occurring or judgments entered after the date of the offense before the court. *State v. Mangrella*, 214 N.J. Super. 437, 519 A.2d 926, 1986 N.J. Super. LEXIS 1542 (App.Div. 1986).

41. Defendant was properly sentenced as a persistent offender to an extended term of imprisonment where defendant's prior convictions fulfilled the statutory requirements, under N.J. Stat. Ann. § 2C:44-3(a); he was over the age of 21 and had been previously convicted on at least 2 separate occasions of at least 2 crimes, committed at different times, when he was at least 18 years of age. *State v. Garcia*, 204 N.J. Super. 202, 497 A.2d 1296, 1985 N.J. Super. LEXIS 1454 (App.Div. 1985).

42. Federal conviction, set aside, could not constitute a predicate offense suitable to use as the basis for sentencing defendant under N.J. Stat. Ann. § 2C:44-3(a) to concurrent terms aggregating 15 years with 7 1/2 years of parole ineligibility for recidivism. *State v. Stackhouse*, 194 N.J. Super. 371, 476 A.2d 1268, 1984 N.J. Super. LEXIS 1017 (App.Div. 1984).

43. In every case where the imposition of an extended prison term is subject to the habitual offender requirements of N.J. Stat. Ann. § 2C:44-3, eligibility for resentencing must be determined by comparing the applicant's present maximum with the maximum ordinary term for the correlative crime under N.J. Stat. Ann. § 2C:1-1 et seq. if the

maximum under § 2C:1-1 et seq. is less, the applicant is entitled to a resentencing hearing under N.J. Stat. Ann. § 2C:1-1(d)(2). *State v. Maguire*, 84 N.J. 508, 423 A.2d 294, 1980 N.J. LEXIS 1402 (1980).

44. Pursuant to the provisions of N.J. Stat. Ann. §§ 2C:11-3(b) and 2C:43-7, a person convicted of murder may be sentenced to the maximum term of life imprisonment provided under N.J. Stat. Ann. § 2C:43-7(a)(1) without the necessity for separate enhancement findings under N.J. Stat. Ann. § 2C:44-3. *State v. Maguire*, 84 N.J. 508, 423 A.2d 294, 1980 N.J. LEXIS 1402 (1980).

45. Where defendant, having been sentenced on one date for five offenses, all were regarded as one conviction for the purpose of determining whether defendant was an habitual offender under former N.J. Stat. Ann. §§ 2A:85-8, 2A:85-9 (now N.J. Stat. Ann. § 2C:44-3). *State v. Williams*, 167 N.J. Super. 57, 400 A.2d 513, 1979 N.J. Super. LEXIS 687 (App.Div. 1979).

46. Former N.J. Stat. § 2A:85-13 (now N.J. Stat. Ann. § 2C:44-3) protects a defendant because the determination of the habitual offender charge in a separate proceeding cannot possibly influence the determination of his guilt or innocence of the crime for which he is indicted; the statute gives the defendant every opportunity, including a jury trial on the issue of identity if he so desires, to show that the provisions of the habitual offender law should not be applied to him, and the State is given additional time to uncover a defendant's previous record in that it can now present an habitual offender accusation at any time before sentence. *State v. Washington*, 47 N.J. 244, 220 A.2d 185, 1966 N.J. LEXIS 211 (1966).

47. Multiple narcotics offender was entitled to the same protection on sentencing under the Narcotics Drug Law, former N.J. Stat. Ann. § 24:18-47(b)(3), as that found in former N.J. Stat. Ann. § 2A:85-13 (now N.J. Stat. Ann. § 2C:44-3), the general Habitual Offenders Act, which contemplated a jury determination of prior convictions upon the formal service of an accusation by the state accusing defendant of prior convictions. *State v. Tyler*, 88 N.J. Super. 396, 212 A.2d 573, 1965 N.J. Super. LEXIS 367 (App.Div. 1965), writ of certiorari denied by 384 U.S. 992, 86 S. Ct. 1898, 16 L. Ed. 2d 1008, 1966 U.S. LEXIS 1390 (1966).

48. Pursuant to N.J. Ct. R. 3:7-10(a), an indigent defendant was permitted, upon the motion of his appellate counsel, to withdraw his guilty plea to the habitual offender accusation under former N.J. Stat. Ann. § 2A:85-12 (now N.J. Stat. Ann. § 2C:44-3), even though he already had been sentenced; the rule permitted such an application after sentencing "to correct manifest injustice." *Application of Palumbo*, 58 N.J. Super. 80, 155 A.2d 571, 1959 N.J. Super. LEXIS 550 (App.Div. 1959), writ of certiorari denied by 368 U.S. 905, 82 S. Ct. 184, 7 L. Ed. 2d 99, 1961 U.S. LEXIS 267 (1961).

49. Once a defendant appealed from a judgment convicting him of a crime, the trial court lacked jurisdiction to vacate a defective sentence imposed by that judgment, and to resentence defendant correctly. *State v. Wimbush*, 54 N.J. Super. 283, 148 A.2d 724, 1959 N.J. Super. LEXIS 492 (App.Div. 1959).

50. A defendant was entitled to have granted his writ of habeas corpus to review the legality of his confinement for life in state prison after having pleaded guilty to three separate allegations each charging, in one count, armed robbery and, in the second count, that defendant was previously convicted of three high misdemeanors, resulting in a term of life imprisonment in each case; where former N.J. Stat. Ann. § 2A:85-12 (now N.J. Stat. Ann. § 2C:44-3) subjected an offender to a life sentence only if he had on three separate occasions been convicted of high misdemeanors, defendant's life sentences were erroneously applied where two of his convictions were disposed of on one occasion and could be considered as only one conviction. *State v. Culver*, 30 N.J. Super. 561, 105 A.2d 429, 1954 N.J. Super. LEXIS 684 (App.Div. 1954), affirmed by 16 N.J. 483, 109 A.2d 422, 1954 N.J. LEXIS 240 (1954).

51. Word "occasions" in the phrase of the former Habitual Offender Act, N.J. Stat. § 2A:85-12 (now N.J. Stat. Ann. § 2C:44-3), "convicted on 3 separate occasions" was synonymous with "conviction," i.e., the number of occasions being equal to and determinable by the number of convictions, and was not limited by the time on which they occurred; as

such, defendant was adjudged a habitual criminal where, although the convictions occurred on the same day, they were considered separate occasions. *State v. McCall*, 27 N.J. Super. 157, 99 A.2d 153, 1953 N.J. Super. LEXIS 694 (App.Div. 1953), vacated by 14 N.J. 538, 103 A.2d 376, 1954 N.J. LEXIS 341 (1954).

52. Defendant's convictions on four separate counts of robbery and his sentence as a third offender under former N.J. Rev. Stat. § 2:103-9 was affirmed; it was not error to cite his two prior robbery convictions in his indictment and the evidence of them was not harmful as tending to establish guilt of the substantive crime laid to defendant in the indictment. *State v. Lutz*, 135 N.J.L. 603, 52 A.2d 773, 1947 N.J. Super. LEXIS 395 (N.J. Super. Ct. 1947), questioned by *State v. Washington*, 47 N.J. 244, 220 A.2d 185, 1966 N.J. LEXIS 211 (1966).

53. Where the prisoner had lost his right of commutation pursuant to N.J. Stat. Ann. § 30:4-140 by being a third-time offender, it did not constitute the imposition of a greater sentence than that which the law imposed for his offense, and, therefore, his rights were not infringed by the failure to charge in the indictment the previous convictions in order that he be informed of the accusations because he was not then accused of being, or sentenced as, a multiple offender and was in fact given no greater sentence than he could have received as a first offender. *In re O'Connor*, 130 N.J.L. 194, 32 A.2d 361, 1943 N.J. Super. LEXIS 403 (N.J. Super. Ct. 1943).

54. On the entry of a negotiated plea of guilty to aggravated manslaughter, N.J. Stat. Ann. § 2C:11-4(a), the prosecutor's failure to submit a written motion for extended-term sentencing under N.J. Stat. Ann. § 2C:43-7(a), (c); 2C:44-3(a) to -(d) was not error because, even assuming a written application was needed to make a discretionary motion for an extended term of imprisonment under N.J. Ct. R. 3:21-4(e), the trial court also imposed an extended term under the Graves Act, N.J. Stat. Ann. § 2C:43-6(c), -7(c), which required no motion. *State v. Szemple*, 332 N.J. Super. 322, 753 A.2d 732, 2000 N.J. Super. LEXIS 251 (App.Div. 2000).

55. Before an extended term for a second Graves Act violation can be imposed, the prosecutor at a hearing must provide a copy of the prior conviction, transcripts of testimony, or other proofs demonstrating that the defendant used a firearm during the commission of the prior crime; where there is a question as to whether a firearm, as defined by N.J. Stat. Ann. § 2C:39-1(f), was involved in the transaction, the burden is on the State to prove prior use or possession of a firearm. *State v. Robinson*, 253 N.J. Super. 346, 601 A.2d 1162, 1992 N.J. Super. LEXIS 23 (App.Div. 1992).

56. Where defendant pleaded guilty to possession of cocaine with intent to distribute, the trial court was required by N.J. Stat. Ann. § 2C:43-1(b) to consider the aggravating and mitigating factors contained in the sentencing provisions of the Code of Criminal Justice, specifically N.J. Stat. Ann. §§ 2C:44-1 to 2C:44-6; the trial court was required to make its findings of sentencing factors explicit so that the appellate courts could determine whether its sentencing discretion was soundly exercised. *State v. Sainz*, 107 N.J. 283, 526 A.2d 1015, 1987 N.J. LEXIS 317 (1987).

57. As to a defendant's convictions for offenses involving sexual assault and kidnapping, his convictions were upheld on appeal and he was properly found to be a persistent offender based on multiple prior convictions but the trial judge erred in sentencing him by improperly imposing two concurrent extended terms of 30 years, in violation of N.J. Stat. Ann. § 2C:44-5(a)(2). The statutory limit of only one extended term was violated even though the terms were imposed concurrently. *N.J. v. Darnell Stewart*, 2009 N.J. Super. Unpub. LEXIS 2381 (Apr. 29, 2009).

58. Just as presumptive sentences were no longer used as a starting point for a trial court's sentencing analysis, so too there was not a presumptive starting point for a court's analysis within the broadened range encompassing the breadth of an original-term range and an available extended-term range, to which a defendant was exposed under N.J. Stat. Ann. § 2C:44-3(a). *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

59. Even though defendant was found a persistent offender under N.J. Stat. Ann. § 2C:44-3(a), defendant was entitled to resentencing for a burglary conviction after receiving an extended eight-year term with a four-year parole bar, where the former presumptive term was seven years; under *State v. Natale (Natale II)*, 878 A.2d 724 (2005), which

eliminated the presumptive terms, the sentencing judge must determine on resentencing whether the absence of the presumptive term in the weighing process requires a different sentence, and follow Natale II in fixing the specific term of the extended sentence. *State v. Drew*, 383 N.J. Super. 185, 891 A.2d 621, 2006 N.J. Super. LEXIS 24 (App.Div. 2006).

60. Judicial fact finding respecting a defendant's eligibility for an extended term as a persistent offender does not violate *Blakely v. Washington*, 542 U.S. 296 (2004), because it is predicated on defendant's prior record. *State v. Drew*, 383 N.J. Super. 185, 891 A.2d 621, 2006 N.J. Super. LEXIS 24 (App.Div. 2006).

61. Second-offender provision of the Graves Act, permitting the imposition of an extended prison term based in judicial factfinding that defendant committed second-degree passion/provocation manslaughter with a handgun even though the jury did not make that specific finding in convicting defendant, violated defendant's constitutional rights to a jury trial and due process; *Apprendi* required that in order to enhance a sentence, by means of a fact other than a prior conviction, the fact that increased the penalty for a crime beyond the prescribed statutory maximum had to be submitted to a jury and proved beyond a reasonable doubt, which did not occur in defendant's case. *State v. Franklin*, 184 N.J. 516, 878 A.2d 757, 2005 N.J. LEXIS 937 (2005).

62. Under N.J. Stat. Ann. § 2C:44-3(a), multiple convictions may be considered by the sentencing court in determining if a defendant is a persistent offender irrespective of their chronology so long as the other statutory criteria are met; when a sentencing judge considers the issue of whether a defendant is a persistent offender under N.J. Stat. Ann. 2C:44-4(a), the judge may weigh judgments of conviction entered chronologically after the defendant committed the instant crime. *State v. Cook*, 330 N.J. Super. 395, 750 A.2d 91, 2000 N.J. Super. LEXIS 187 (App.Div. 2000).

63. Extended term sentence of life imprisonment with a 25-year mandatory minimum parole bar imposed under N.J. Stat. Ann. § 2C:43-7(b) for first-degree kidnapping offense was not excessive where defendant was a repeat offender under N.J. Stat. Ann. § 2C:44-3(a) and presented no mitigating factors. *State v. Pennington*, 154 N.J. 344, 712 A.2d 1133, 1998 N.J. LEXIS 609 (1998).

64. Mandatory imposition of an extended term sentence under N.J. Stat. Ann. § 2C:44-3(d) and N.J. Stat. Ann. § 2C:43-6(c), cannot be based upon a foreign conviction; however, the seriousness of defendant's record and the aggravated nature of his offense was a more than sufficient basis for the court to impose the presumptive extended base term of 50-years imprisonment, with 20-years of parole ineligibility. *State v. Guzman*, 313 N.J. Super. 363, 712 A.2d 1233, 1998 N.J. Super. LEXIS 310 (App.Div. 1998).

65. Trial court did not commit an abuse of discretion in imposing an extended term on defendant's third-degree conviction of aggravated assault while eluding a police officer after finding that defendant met the criteria of a persistent offender under N.J. Stat. Ann. § 2C:44-3(a); although defendant's prior convictions did not involve crimes of violence, they were similar to several of the property-related offenses in the current prosecution, and defendant's law-abiding life was for a relatively short period. *State v. Bauman*, 298 N.J. Super. 176, 689 A.2d 173, 1997 N.J. Super. LEXIS 88 (App.Div. 1997).

66. Trial court was authorized under N.J. Stat. Ann. § 2C:44-3 to impose an extended sentence upon defendant, following his conviction of armed robbery, possession of a weapon for an unlawful purpose, possession of a prohibited weapon and possession of a weapon without the requisite permit, based upon defendant's prior Canadian conviction of armed robbery. *State v. Williams*, 284 N.J. Super. 142, 663 A.2d 1378, 1995 N.J. Super. LEXIS 277 (Law Div. 1995), affirmed by 309 N.J. Super. 117, 706 A.2d 795, 1998 N.J. Super. LEXIS 94 (App.Div. 1998).

67. Before an extended term for a second Graves Act violation can be imposed, the prosecutor at a hearing must provide a copy of the prior conviction, transcripts of testimony, or other proofs demonstrating that the defendant used a firearm during the commission of the prior crime; where there is a question as to whether a firearm, as defined by N.J. Stat. Ann. § 2C:39-1(f), was involved in the transaction, the burden is on the State to prove prior use or possession of a

firearm. *State v. Robinson*, 253 N.J. Super. 346, 601 A.2d 1162, 1992 N.J. Super. LEXIS 23 (App.Div. 1992).

68. In a criminal proceeding, the lower court properly granted state's motion for imposition of an extended term based on defendant's status as a persistent offender; pursuant to N.J. Stat. Ann. § 2C:44-3, prior convictions previously used as a basis for habitual offender sentence could be used again to justify an extended term. *State v. Reldan*, 231 N.J. Super. 232, 555 A.2d 653, 1989 N.J. Super. LEXIS 87 (App.Div. 1989).

69. Construction of provisions of The Graves Act, specifically N.J. Stat. Ann. §§ 2C:43-6(d), 2C:43-7(c), and 2C:44-3(d), 2C:44-6(e), results in the conclusion that a hearing is required not only to determine whether the present offense before the trial court is a Graves Act offense but also to determine whether defendant previously committed a Graves Act offense so as to be subject to a mandatory extended term by authority of N.J. Stat. Ann. § 2C:44-3. *State v. Martin*, 110 N.J. 10, 538 A.2d 1229, 1988 N.J. LEXIS 23 (1988).

70. Where defendant pleaded guilty to possession of cocaine with intent to distribute, the trial court was required by N.J. Stat. Ann. § 2C:43-1(b) to consider the aggravating and mitigating factors contained in the sentencing provisions of the Code of Criminal Justice, specifically N.J. Stat. Ann. §§ 2C:44-1 to 2C:44-6; the trial court was required to make its findings of sentencing factors explicit so that the appellate courts could determine whether its sentencing discretion was soundly exercised. *State v. Sainz*, 107 N.J. 283, 526 A.2d 1015, 1987 N.J. LEXIS 317 (1987).

71. Defendant was sentenced as a persistent offender pursuant to N.J. Stat. Ann. § 2C:44-3(a) to an extended term of 10 years, half of which was to be served without parole eligibility; at the time of the plea, the prosecutor had expressly reserved the right to move for an extended term pursuant to N.J. Ct. R. 3:21-4(d); nevertheless, both the prosecutor and the trial judge had stated that defendant was subject to a maximum sentence of 5 years and that he could be denied parole eligibility for one-half of that term; thus, the sentence ultimately imposed illegally exceeded defendant's reasonable expectations per the plea agreement. *State v. Cartier*, 210 N.J. Super. 379, 510 A.2d 47, 1986 N.J. Super. LEXIS 1278 (App.Div. 1986).

72. Trial court did not err in sentencing a felony murder defendant to an aggregate sentence of 70 years with 25 years of parole ineligibility because of the cruel and callous manner in which defendant robbed and killed his victim; when sentencing to an extended term, the trial court was not required to make the findings called for by N.J. Stat. Ann. § 2C:44-3 as long as he carefully evaluated the aggravating and mitigating factors in N.J. Stat. Ann. § 2C:44-1. *State v. Arriagas*, 198 N.J. Super. 575, 487 A.2d 1290, 1985 N.J. Super. LEXIS 1169 (App.Div. 1985), affirmed by 102 N.J. 265, 508 A.2d 167, 1986 N.J. LEXIS 886 (1986).

73. Even though the increased sentence did not violate defendant's double jeopardy rights, as argued by defendant, it was error to resentence him because N.J. Stat. Ann. § 2C:44-3(d) did not require an extended term under the circumstances of his case. *State v. Copeman*, 197 N.J. Super. 261, 484 A.2d 1250, 1984 N.J. Super. LEXIS 1239 (App.Div. 1984).

74. Pursuant to the provisions of N.J. Stat. Ann. §§ 2C:11-3(b) and 2C:43-7, a person convicted of murder may be sentenced to the maximum term of life imprisonment provided under N.J. Stat. Ann. § 2C:43-7(a)(1) without the necessity for separate enhancement findings under N.J. Stat. Ann. § 2C:44-3. *State v. Maguire*, 84 N.J. 508, 423 A.2d 294, 1980 N.J. LEXIS 1402 (1980).

75. Plain error occurred where the trial court failed to give defendant notice and an opportunity to be heard regarding a prior conviction before imposing an enhanced sentence based upon that prior conviction. *State v. Booker*, 88 N.J. Super. 510, 212 A.2d 849, 1965 N.J. Super. LEXIS 377 (App.Div. 1965), writ of certiorari denied by 384 U.S. 944, 86 S. Ct. 1472, 16 L. Ed. 2d 543, 1966 U.S. LEXIS 1698 (1966).

76. With regard to defendant's sentencing on a robbery and eluding count, among other crimes, the trial court erred by failing to place on the record its reasons for applying an extended term to a different charge than that sought by the

prosecutor. Therefore, the case required a remand to the trial court for an explanation of why it declined to accept the prosecutor's application to apply an extended term sentence to the eluding count and instead applied the extended term to the robbery count. *State v. Thomas*, 195 N.J. 431, 950 A.2d 209, 2008 N.J. LEXIS 792 (2008).

77. Sentencing court's determination that defendant could be sentenced as a persistent offender, under N.J. Stat. Ann. § 2C:44-3(a), did not violate the Sixth Amendment because the determination was based on defendant's prior convictions, so it was allowable under the prior-conviction exception to the Apprendi rule. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

78. When it was requested that defendant be sentenced as a persistent offender to an extended term, the sentencing court first had to determine if defendant met the qualifications for such a sentence, under N.J. Stat. Ann. § 2C:44-3(a), and once the sentencing court so found, the sentencing range to which defendant was exposed, for Apprendi purposes, went from the minimum ordinary sentence to the maximum enhanced sentence, and a jury did not have to find the facts used to determine what sentence, within that range, should be imposed, so the sentencing court's consideration of whether defendant posed a danger to the public, in determining his sentence, did not violate the Sixth Amendment. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

79. Under N.J. Stat. Ann. § 2C:44-3(a), a sentencing court did not impermissibly find facts by assessing a prior conviction record and finding defendant statutorily eligible for an extended term as a persistent offender, but it was necessary to modify prior directions to sentencing courts as to the discretionary extended-term sentencing process. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

80. Sentencing procedures established in prior cases had to be restated to set in proper perspective the timing and purpose of the judicial fact-finding related to the "need for protection of the public," so that finding was not made until after a defendant had been determined to be subject, for Apprendi purposes, to a sentence up to the maximum of the discretionary extended-term range based on statutory eligibility as a persistent offender; the determination of the length of sentence imposed on a defendant, and whether that sentence should be within the permissibly enhanced range were, had to be regarded as separate and distinct from the court's determination of the top of the entire range of sentences to which a defendant was potentially subject as a persistent offender, as the sentencing court had to first, on application for discretionary enhanced-term sentencing under N.J. Stat. Ann. § 2C:44-3(a), review and determine whether a defendant's criminal record of convictions rendered him or her statutorily eligible, and, if so, then the top of the range of sentences applicable to the defendant, for purposes of Apprendi, became the top of the enhanced range. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

81. After a sentencing court determined, under N.J. Stat. Ann. § 2C:44-3(a), that a defendant was subject to enhanced-term sentencing, whether the court chose to use the full range of sentences was a function of the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public, and consideration of the protection of the public occurred during this phase of the sentencing process. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

82. Sentencing court's determination of whether a defendant met the minimum statutory requirements, under N.J. Stat. Ann. § 2C:44-3(a), for an extended-term sentence, based on objective facts gleaned from the record of a defendant's criminal convictions, could be made by the court, rather than a jury. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

83. When a defendant was found eligible to receive an enhanced sentence, under N.J. Stat. Ann. § 2C:44-3(a), a reference to a finding of "need to protect the public" was not a precondition to eligibility for sentencing up to the top of the discretionary extended-term range. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

84. In imposing an extended term, under N.J. Stat. Ann. § 2C:44-3(a), a sentencing court could consider the protection of the public when assessing the appropriate length of a defendant's base term as part of the court's finding

and weighing of aggravating factors and mitigating factors, but the finding was not a necessary condition to the court's determination whether defendant was subject to a sentence up to the top of the extended-term range, so New Jersey's sentencing practice was rid of any ambiguity suggestive of a Sixth Amendment transgression by means of a remedy that preserved what the legislature would prefer -- keeping the exercise of sentencing discretion in the hands of courts, not juries. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

85. Trial court did not err in sentencing a felony murder defendant to an aggregate sentence of 70 years with 25 years of parole ineligibility because of the cruel and callous manner in which defendant robbed and killed his victim; when sentencing to an extended term, the trial court was not required to make the findings called for by N.J. Stat. Ann. § 2C:44-3 as long as he carefully evaluated the aggravating and mitigating factors in N.J. Stat. Ann. § 2C:44-1. *State v. Arriagas*, 198 N.J. Super. 575, 487 A.2d 1290, 1985 N.J. Super. LEXIS 1169 (App.Div. 1985), affirmed by 102 N.J. 265, 508 A.2d 167, 1986 N.J. LEXIS 886 (1986).

86. Sentencing court's determination that defendant could be sentenced as a persistent offender, under N.J. Stat. Ann. § 2C:44-3(a), did not violate the Sixth Amendment because the determination was based on defendant's prior convictions, so it was allowable under the prior-conviction exception to the Apprendi rule. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

87. When it was requested that defendant be sentenced as a persistent offender to an extended term, the sentencing court first had to determine if defendant met the qualifications for such a sentence, under N.J. Stat. Ann. § 2C:44-3(a), and once the sentencing court so found, the sentencing range to which defendant was exposed, for Apprendi purposes, went from the minimum ordinary sentence to the maximum enhanced sentence, and a jury did not have to find the facts used to determine what sentence, within that range, should be imposed, so the sentencing court's consideration of whether defendant posed a danger to the public, in determining his sentence, did not violate the Sixth Amendment. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

88. Under N.J. Stat. Ann. § 2C:44-3(a), a sentencing court did not impermissibly find facts by assessing a prior conviction record and finding defendant statutorily eligible for an extended term as a persistent offender, but it was necessary to modify prior directions to sentencing courts as to the discretionary extended-term sentencing process. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

89. Sentencing procedures established in prior cases had to be restated to set in proper perspective the timing and purpose of the judicial fact-finding related to the "need for protection of the public," so that finding was not made until after a defendant had been determined to be subject, for Apprendi purposes, to a sentence up to the maximum of the discretionary extended-term range based on statutory eligibility as a persistent offender; the determination of the length of sentence imposed on a defendant, and whether that sentence should be within the permissibly enhanced range were, had to be regarded as separate and distinct from the court's determination of the top of the entire range of sentences to which a defendant was potentially subject as a persistent offender, as the sentencing court had to first, on application for discretionary enhanced-term sentencing under N.J. Stat. Ann. § 2C:44-3(a), review and determine whether a defendant's criminal record of convictions rendered him or her statutorily eligible, and, if so, then the top of the range of sentences applicable to the defendant, for purposes of Apprendi, became the top of the enhanced range. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

90. After a sentencing court determined, under N.J. Stat. Ann. § 2C:44-3(a), that a defendant was subject to enhanced-term sentencing, whether the court chose to use the full range of sentences was a function of the court's assessment of the aggravating and mitigating factors, including the consideration of the deterrent need to protect the public, and consideration of the protection of the public occurred during this phase of the sentencing process. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

91. Sentencing court's determination of whether a defendant met the minimum statutory requirements, under N.J.

Stat. Ann. § 2C:44-3(a), for an extended-term sentence, based on objective facts gleaned from the record of a defendant's criminal convictions, could be made by the court, rather than a jury. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

92. In imposing an extended term, under N.J. Stat. Ann. § 2C:44-3(a), a sentencing court could consider the protection of the public when assessing the appropriate length of a defendant's base term as part of the court's finding and weighing of aggravating factors and mitigating factors, but the finding was not a necessary condition to the court's determination whether defendant was subject to a sentence up to the top of the extended-term range, so New Jersey's sentencing practice was rid of any ambiguity suggestive of a Sixth Amendment transgression by means of a remedy that preserved what the legislature would prefer -- keeping the exercise of sentencing discretion in the hands of courts, not juries. *State v. Pierce*, 188 N.J. 155, 902 A.2d 1195, 2006 N.J. LEXIS 1151 (2006).

93. When a Graves Act Crime, N.J. Stat. Ann. § 2C:44-3(d), merged with a non-Graves Act crime, the sentence had to be at least equal in length to the mandatory sentence required for the Graves Act crime; if the sentencing guidelines for the non-Graves Act crime did not permit that long a sentence, the Graves Act crime survived the merger. *State v. Connell*, 208 N.J. Super. 688, 506 A.2d 829, 1986 N.J. Super. LEXIS 1172 (App.Div. 1986).

94. Where the remand court imposed both a discretionary extended term sentence under N.J. Stat. Ann. § 2C:44-3a and a sentence above the presumptive extended term, the appeals court vacated the specific extended term sentence and remanded for imposition of an extended term sentence consistent with *Natale*, (*Natale II*), which required a new sentencing hearing. *State v. Young*, 379 N.J. Super. 498, 879 A.2d 1196, 2005 N.J. Super. LEXIS 248 (App.Div. 2005), remanded by 188 N.J. 269, 905 A.2d 878, 2006 N.J. LEXIS 1287 (2006), remanded by 188 N.J. 349, 907 A.2d 1010, 2006 N.J. LEXIS 1522 (2006).

95. On the entry of a negotiated plea of guilty to aggravated manslaughter, N.J. Stat. Ann. § 2C:11-4(a), the prosecutor's failure to submit a written motion for extended-term sentencing under N.J. Stat. Ann. § 2C:43-7(a), (c); 2C:44-3(a) to -(d) was not error because, even assuming a written application was needed to make a discretionary motion for an extended term of imprisonment under N.J. Ct. R. 3:21-4(e), the trial court also imposed an extended term under the Graves Act, N.J. Stat. Ann. § 2C:43-6(c), -7(c), which required no motion. *State v. Szemplé*, 332 N.J. Super. 322, 753 A.2d 732, 2000 N.J. Super. LEXIS 251 (App.Div. 2000).

96. In every case where the imposition of an extended prison term is subject to the habitual offender requirements of N.J. Stat. Ann. § 2C:44-3, eligibility for resentencing must be determined by comparing the applicant's present maximum with the maximum ordinary term for the correlative crime under N.J. Stat. Ann. § 2C:1-1 et seq. if the maximum under § 2C:1-1 et seq. is less, the applicant is entitled to a resentencing hearing under N.J. Stat. Ann. § 2C:1-1(d)(2). *State v. Maguire*, 84 N.J. 508, 423 A.2d 294, 1980 N.J. LEXIS 1402 (1980).

97. Petitioner's request for habeas relief based on Apprendi error related to his sentence enhancement was denied because the first basis for the petitioner's extended term (that the petitioner was convicted of first degree robbery), had been submitted to a jury and proven beyond a reasonable doubt and the second basis (that the petitioner was a persistent offender), did not fall within the scope of Apprendi because the petitioner's enhanced sentence as a persistent offender based upon a record of prior convictions, N.J. Stat. Ann. § 2C:44-3(a), was a fact which could be determined by the judge and could serve as the basis for determining his statutory maximum sentence. *Abdullah v. Moore*, 2005 U.S. Dist. LEXIS 18411 (D.N.J. Aug. 23 2005).

98. Contention that the trial court erred by imposing a 50-year extended term as a persistent offender when two prior convictions on which the State relied involved were not committed at different times, as required by N.J. Stat.

Ann. § 2C:44-3(a), was not cognizable under 28 U.S.C.S. § 2254 because it did not assert a federal constitutional claim where the habeas petitioner did not assert that his sentence violated the U.S. Constitution; moreover, absent a claim that a sentence constituted cruel and unusual punishment prohibited by the Eighth Amendment or that it was arbitrary or otherwise in violation of due process, the legality of the sentence was a question of state law. *McCalla v. Greiner*, 2005 U.S. Dist. LEXIS 23410 (D.N.J. Oct. 3 2005).

99. Inmate's third petition for habeas corpus in which the inmate raised claims identical to those asserted in previous unsuccessful petitions was not barred by res judicata; the doctrine of res judicata was inapplicable in a habeas corpus proceeding. *Worbetz v. Goodman*, 47 N.J. Super. 391, 136 A.2d 1, 1957 N.J. Super. LEXIS 646 (App.Div. 1957).

100. Proceedings taken pursuant to N.J. Stat. Ann. § 33:1-31 to revoke or suspend an alcoholic beverage license are civil and disciplinary in nature, and the provisions of former N.J. Stat. Ann. § 2A:85-13 (now N.J. Stat. Ann. § 2C:44-3), concerning the criminal law, are inapplicable. *Butler Oak Tavern v. Division of Alcoholic Beverage Control, etc.*, 20 N.J. 373, 120 A.2d 24, 1956 N.J. LEXIS 276 (1956).

LAW REVIEWS & JOURNALS

1. 58 Rutgers L. Rev. 583, NOTE: Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement.

2. 30 Seton Hall L. Rev. 893, NOTE: Beyond a Reasonable Doubt: Limiting the Ability of States to Define Elements of an Offense in the Context of Hate Crime Legislation.

3. 32 Seton Hall L. Rev. 769, ARTICLE: The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Cast, Same Script.

4. 20 Seton Hall Legis. J. 97, NOTE: "THREE STRIKES AND YOU'RE OUT": THE SOLUTION TO THE REPEAT OFFENDER PROBLEM.

5. 20 Seton Hall Legis. J. 503, NOTE: JUGGLING THE FIRST AMENDMENT: NEW JERSEY'S STRUGGLE WITH REGULATING HATE CRIMES.

6. 22 Seton Hall Legis. J. 357, NOTE: NEW JERSEY'S NO EARLY RELEASE ACT: A BAND-AID APPROACH TO VICTIMS' PAIN AND RECIDIVISM.

7. 24 Seton Hall Legis. J. 371, SYMPOSIUM: HATE-CRIMES LEGISLATION: LOCAL, STATE AND FEDERAL PERSPECTIVES.

8. 24 Seton Hall Legis. J. 509, NOTE: RACISTS, SKINHEADS AND GAY-BASHERS BEWARE: CONGRESS JOINS THE BATTLE AGAINST HATE CRIMES BY PROPOSING THE HATE CRIMES PREVENTION ACT OF 1999.

9. 25 Seton Hall Legis. J. 273, SUPPLEMENT: DUE PROCESS -- Any Factor That Increases The Penalty For A Crime Beyond The Statutory Prescribed Maximum Must Be Submitted To a Jury Beyond A Reasonable Doubt -- *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

10. 26 Seton Hall Legis. J. 363, REFLECTIONS ON LEGISLATION: THE EVOLUTION OF NEW JERSEY'S

BIAS CRIME LAW.

11. 31 Seton Hall Legis. J. 391, NOTE: The Effects of Modern Constitutional Sentencing Law and Natale, Franklin and Abdullah on New Jersey Sentencing Law and Relationship to the Legislative Intent Behind the New Jersey Criminal Sentencing Code.